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SUPREME COURT OF THE UNITED STATES

**OCTOBER TERM, 1933**

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# No. 855

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MRS. MARGARET SHEA LYNCH,
*Petitioner,*

*vs.*

THE UNITED STATES OF AMERICA.

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**PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT AND BRIEF IN SUPPORT THEREOF.**

---

ROWLAND W. FIXEL,
ARTHUR E. FIXEL,
JOHN J. MCCREARY,
M. FROOME BARBOUR,
*Counsel for Petitioner.*

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1933

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# No. 855

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MRS. MARGARET SHEA LYNCH,
*Petitioner (Appellant below),*

vs.

THE UNITED STATES OF AMERICA,
*Respondent (Appellee below).*

---

## PETITION FOR WRIT OF CERTIORARI.

*To the Supreme Court of the United States: Hughes, Chief Justice of the United States, and the Associate Justices of the Supreme Court of the United States:*

The petition of Mrs. Margaret Shea Lynch, a citizen of the United States, respectfully shows:

I.

### Summary Statement of the Matter Involved:

Petitioner's suit was brought against the United States of America under the laws of the United States, and particularly under the Adjusted World War Veterans Act, on a $10,000.00 contract of War Risk Insurance issued by the United States of America to Thomas S. Lynch, a son of

petitioner. It was alleged by petitioner in said suit that the insured died in 1924 of a disease which had rendered him totally and permanently disabled during the life of the policy. Her claim for said insurance had been duly filed and held for consideration until March 29, 1933, at which time petitioner was informed that no further consideration would be given said claim by the respondent.

The only reason given petitioner by the Veterans Administration why payment was declined was that by "An Act to Maintain the Credit of the United States Government," approved March 20, 1933, being Public Act No. 2 of the 73rd Congress, all laws granting or pertaining to yearly renewable term insurance (with certain exceptions not material to this case) had been repealed. That during all these years the claim, with supporting proofs, called for and supplied from time to time, had been pending before the Veterans Administration.

Petitioner filed suit in April, 1933, alleging in addition to the material averments of her claim that the said Public Act No. 2 of the 73rd Congress, being the Act of March 20, 1933, entitled, "An Act to Maintain the Credit of the United States Government," violated the following provisions of the Constitution of the United States:

a. Amendment V, providing: "No person shall * * * be deprived of life, liberty or property without due process of law; nor shall private property be taken for public use without just compensation." (The regulation adopted pursuant to said act, discontinuing payments of term insurance, was attacked on the same ground.)

b. Art. I, Sec. 1, providing: "All legislative powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and a House of Representatives."

c. Art. III, Sec. 1, providing "The judicial power of the United States shall be vested in one Supreme Court and in such inferior courts as the Congress may from time to time ordain and establish."

d. Art. IV, Sec. 2, providing "The citizens of each State shall be entitled to all privileges and immunities of the citizens of the several States."

The defendant's [illegible] general demurrer raised only the following express issues:

a. That the suit was filed against the Sovereign, and showed on its face that it was filed without the consent of the Sovereign.

b. That the suit showed that prior to its filing Congress had withdrawn the Sovereign's consent to be sued.

c. That the suit showed that there exists no disagreement between plaintiff and defendant, such as was required by the former acts permitting the Government to be sued before repeal of said former acts.

By separate paragraphs, defendant demurred specially to all allegations that the Economy Act violated the Constitution (except as to the Fifth Amendment) on the ground that they were "immaterial, irrelevant and surplusage."

The District Court sustained the Government's demurrer and dismissed the case, whereupon petitioner appealed to the Circuit Court of Appeals, First Circuit, which affirmed the District Court on the one ground that Section 17 of the Act of March 20, 1933, repealing said term insurance laws and thereby withdrawing the Government's consent to be sued, is broad enough to deprive the District Court of jurisdiction whether vested by the provisions of the Tucker Act or the War Risk Insurance Act. The single case of

*White* v. *U. S.*, 270 U. S. 175, holding that the insurance contract was subject to any provision of law subsequently enacted without impairing the beneficiary's constitutional rights, was cited.

By a timely petition for a rehearing, petitioner prayed said Circuit Court of Appeals to distinguish the legal effect of a repealing act from that of an amending act, and also to declare that the Fifth Amendment is self-executing and needs neither the Tucker Act nor the War Risk Insurance Act to aid the carrying out of its provisions. The Circuit Court of Appeals denied this petition on December 14, 1933 (see 67 Fed. (2d) 490), and petitioner applies for this writ of certiorari within three months of said date.

## II.

## Reasons Relied on For the Allowance of the Writ.

### A.

The decision of the Circuit Court of Appeals in holding that Congress had the power to repeal all laws granting or pertaining to said war risk insurance (with certain exceptions not applicable to this case), and thereby terminate all rights, benefits and remedies under the insurance policy on which suit was herein brought, is an erroneous decision of an important question involving upwards of twenty thousand (20,000) other policy-holders similarly situated.

### B.

The decision of the Circuit Court of Appeals in holding that the United States by reason of its sovereign character, could withdraw its consent to be used on said war risk insurance contract, involves an important question of Federal law which has not been, but should be, settled by this Court.

C.

The decision of the Circuit Court of Appeals in holding the legal principle announced in *White v. United States*, 270 U. S. 175, to be applicable to the facts of this case, is an erroneous decision, in conflict with the principle announced by the Supreme Court in said case.

D.

The decision of the Circuit Court of Appeals in holding in effect that the power to amend the War Risk Insurance Act, with reference to the said contract of insurance, included the power to repeal said act, so as to terminate rights under said insurance contract, which were at the time of the repealing act in full force and effect, and thereby cancel the United States contracts of insurance, including the one sued on in the case at bar, is a decision of a Federal question in conflict with applicable decisions of this Court.

E.

The decision of the Circuit Court of Appeals in holding that the District Court had no jurisdiction to entertain the suit under the Tucker Act or the War Risk Insurance Act, or under the self-executing character of the Fifth Amendment of the Constitution of the United States, involves an important question of Federal law which has not been, but should be, settled by this Court.

III.

**The questions involved are:**

1. Whether Sec. 17 of Public Act No. 2, of the 73rd Congress, being "An Act to Maintain the Credit of the United States Government," approved March 20, 1933, repealing all laws granting or pertaining to yearly renewable term

insurance, is "an amendment" to the War Risk Insurance Act of October 6, 1917, Chap. 105, Art. IV, Sec. 400, Stat. at L. 398, 409, Comp. Stat. 514u, and if so, is said Act in contravention of the Fifth Amendment of the Constitution of the United States?

2. Whether Amendment V of the Constitution of the United States requires the Tucker Act, the War Risk Insurance Act, or any other Act, to authorize suits against the United States on war risk insurance policies, or is said Amendment V self-executing in its character as to such suits?

The specific questions raised by petitioner's assignments of error are not here repeated, reference being made to the record.

IV.

Your petitioner believes that the aforesaid judgment of the Circuit Court of Appeals is erroneous, and that this Honorable Court should require the case to be certified to it for its review and determination, in conformity with the provisions of the Act of Congress in such cases made and provided.

WHEREFORE, your petitioner respectfully prays that a writ of certiorari be issued out of and under the seal of this Honorable Court, directed to the Circuit Court of Appeals for the Fifth Circuit, commanding that court to certify and send to this Court for its review and determination, on a day certain to be therein named, a full and complete transcript of the record and all proceedings in the case numbered and entitled on its docket, No. 7071, Margaret Shea Lynch, Appellant, v. United States of America, Appellee, to the end that this cause may be reviewed and determined by this Court as provided for by the statutes

of the United States, and that the judgment of the United States Circuit Court of Appeals for the Fifth Circuit of December 14, 1933, may be reversed by this Honorable Court, and that your petitioner may have such other and further relief in the premises as to this Honorable Court may seem meet and just.

And your petitioner will ever pray.

This February 24th, 1934.

ROWLAND W. FIXEL,
ARTHUR E. FIXEL,
*Detroit, Mich.*,
JOHN J. McCREARY,
*Macon, Ga.*,
M. FROOME BARBOUR,
*Cincinnati, Ohio,*
*Counsel for Petitioner.*

STATE OF GEORGIA,
*County of Bibb:*

Before me, an officer authorized by law to administer oaths, personally appears John J. McCreary, who, being first duly sworn, deposes and says that he is of counsel for Mrs. Margaret Shea Lynch, the petitioner, that he has had charge of this case in all the courts, that he prepared the foregoing petition, and that the allegations thereof are true as he verily believes.

JOHN J. McCREARY.

Sworn to and subscribed before me this 24th day of February, 1934.

W. C. T———
*Notary Public, Bibb County, Georgia.*

SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1933

# No. 855

MRS. MARGARET SHEA LYNCH,
*Petitioner (Appellant Below)*;

*vs.*

THE UNITED STATES OF AMERICA,
*Respondent (Appellee Below)*.

## BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

### I. Facts.

1. The jurisdiction of this Court is invoked under Section 240 of the Judicial Code as amended, being Title 28, Section 347 (a) of the United States Code Annotated.

2. On November 3, 1933, the Circuit Court of Appeals for the Fifth Circuit affirmed a judgment of the District Court of the United States, for the Middle District of Georgia, sustaining a demurrer to plaintiff's declaration, and on December 14, 1933, denied a petition for rehearing in said cause.

3. The claims advanced by petitioner in the Circuit Court of Appeals were:

(a) That Section 17 of Public Act No. 2, 73rd Congress (38 U. S. C. A. Sec. 701, *et seq.*) is void and unconstitu-

tional in that it impairs the obligation of the contract upon which petitioner sued, deprives her of property without due process of law, and takes private property for public use without just compensation, in contravention of the Fifth Amendment to the Constitution of the United States.

(b) That the Fifth Amendment to the Constitution is self-executing and needs neither the War Risk Insurance Act nor the Tucker Act to aid the carrying out of its provisions. These contentions were overruled by the lower court. See pages 24 and 25 of the record.

4. Official report of the opinion delivered in the court below is found in 67 Fed. (2d) 490.

5. Petitioner's action was based on a war risk insurance policy. The United States demurred to the complaint on the ground that the court was without jurisdiction to entertain the suit because of the provisions of the Act of March 20, 1933 (38 U. S. C. A. Sec. 701, *et seq.*). The demurrer was sustained and the said act was held to be constitutional. This ruling was based on *White* v. *U. S.*, 270 U. S. 175, 46 S. Ct. 274, 70 L. Ed. 530. Petitioner believes that said ruling was erroneously based on said Supreme Court decision, and as the case is of general importance, in that its decision directly affects about 20,000 other similar claims, it is necessary in the public interest that the question of the constitutionality of said act of Congress be determined.

6. Cases believed to sustain said jurisdiction are the following:

*In re Woods*, 143 U. S. 202, 12 S. Ct. 417, 36 L. Ed. 125.

*Forsyth* v. *Hammond*, 166 U. S. 506, 17 S. Ct. 665, 41 L. Ed. 1095.

*St. Louis, K. C. & C. R. Co.* v. *Wabash P. Co.*, 30 S. Ct. 510, 217 U. S. 247, 54 L. Ed. 752.

7. It is urged that the rejection of plaintiff's claim was wrongful in that said rejection was based on a law which plaintiff alleges to be unconstitutional and in violation of the Fifth Amendment to the Constitution.

8. A specification of errors intended to be urged in said petition are as follows:

(a) That the court erred in holding that said contract of war risk insurance was subject to any provision of law subsequently enacted by Congress.

(b) That said court erred in holding that petitioner's constitutional rights were not impaired.

(c) That said court erred in holding Public Act No. 2 of the 73rd Congress (38 U. S. C. A. Sec. 701, *et seq.*) constitutional and valid and not being in contravention of the Fifth Amendment to the Constitution of the United States, insofar as it repealed all laws granting or pertaining to yearly renewable term insurance (excluding such exceptions as are not material to this case).

(d) That said court erred in holding that the United States may not be sued without her consent, under Amendment V to the Constitution of the United States, said amendment being self-executing in its character as to such suits.

## II. Summary of Argument.

1. The contract of insurance involved in this case and the right of action therein is property within the meaning of the Fifth Amendment.

2. Congress has no power to interfere with contracts except where such power is expressly given to it.

3. Rights under war risk insurance may not be cancelled without due process of law.

4. The power to amend a law authorizing a contract between the United States and an individual does not include a power to repeal the law, so as to destroy a vested right already in existence thereunder.

5. The United States in providing for war risk insurance, and granting its consent to be sued, did not act in its sovereign capacity. It was but a party to a contract. Hence it cannot withdraw rights vested under such contract.

6. Congress has no right or power to impair the obligation of the contract of decedent.

7. Congress may not directly impair the obligation of United States contracts, under the claim that it is acting to maintain the credit of the United States.

8. The Fifth Amendment to the Constitution is self-executing and needs neither the War Risk Insurance Act nor the Tucker Act to aid the carrying out of its provisions.

## III. ARGUMENT.

**1. The contract of insurance involved in this case and the right of action therein is property within the meaning of the Fifth Amendment.**

In *White* v. *United States*, 270 U. S. 175, 180, 70 L. Ed. 530, it was held that war risk insurance is a contract. The soldier takes it or leaves it alone; if he takes it, he pays for it, and his benefit is proportional to his payment.

In *Lamb* v. *Powder River Live Stock Company*, 132 Fed. 434-9, it was held that a right of action, which springs from a contract is property within the protection of the Fifth Amendment to the United States Constitution.

That an accrued right of action is a vested property right is well settled.

*Norris* v. *Tripp*, 111 Iowa 115, 82 N. W. 610.

142, 16 L. R. A. 482, 30 Pac. 309.

301, 51 N. W.

289 Fed. 454 (C. C. A. 7) 59

material part of the

4 Wall. 535.

16 Wall. 314.

15 Wall. 610.

and both are

16 Wall. 314.

2. Congress has no power to interfere with contracts except where such power is expressly given to it.

page 356.

what has already been done and

contracts that have already been made,

for what shall be done in the future and

what preparation shall be made for the due per-

formance of contracts already entered into.

99 U. S. 720, 25 L. Ed.

The United States cannot interfere with private rights,

for illegitimate governmental purposes, nor can the

Federal Government deprive any person of property with-

out due process of law.

289 U. S. 709, 25 L. Ed. 496.9

Justice Marshall in *Trustees v. Cruttenden*, 4 Wheat.,

200, in discussing the purpose of the Convention which

framed the Constitution in regard to the protection of private contracts, said that the Convention intended to establish a great principle, "*that contracts should be inviolable.*"

Property vested in contracts is like all other property, protected against invasion by the legislature, whether State or National.

*Loan Association* v. *Topeka*, 20 Wall. 655, 22 L. Ed. 455.

**3. Rights under war risk insurance may not be cancelled without due process of law.**

*Cooley in Const. Limitations*, on page 175, says:

> "The bill of rights in the American Constitution forbids that parties shall be deprived of property except by law of the land; but if it had been omitted, a legislative enactment to pass one man's property over to another would nevertheless be void."

In *Calder* v. *Bull*, 3 Dall. 388, speaking of the powers of legislatures, the court said:

> "They command what is right and prohibit what is wrong, but they cannot change innocence into guilt, or punish innocence as a crime, or violate the right of an antecedent lawful private contract, or the right of private property. To maintain that our Federal or State legislatures possess such powers, if they had not been expressly restrained, would, in my opinion, be a political heresy, altogether inadmissible in our free republican governments.
>
> "A law that destroys or impairs the lawful, private contracts of citizens is against all reason and justice and, therefore, no law."

Justice Butler, in *Highland* v. *Russell Car and Snow Plow Co.*, 279 U. S. 260, 73 L. Ed. 691, said:

"It is everywhere recognized that the freedom of the people to enter into and carry out contracts, in respect to their property and private affairs, is a matter of great public concern and that such liberty may not lightly be impaired. * * * Generally speaking, that right is protected by the due process clauses of the 5th and 14th Amendments."

Where rights are acquired by a citizen under the existing law, there is no power in any branch of the Government to take them away except by due process of law.

6 R. C. L. 444.

*Rowan v. State*, 30 Wis. 129, 11 Am. Rep. 559.

The purpose of this clause is to exclude arbitrary power from every branch of the Government. Hence it is a restraint on the legislative, the executive and judicial departments.

6 R. C. L. 445.

The limitations imposed by the requirements as to due process of law are limits equally on the United States.

*Union Pacific R. R. Co. v. United States*, 99 U. S. 700, 25 L. Ed. 496.

The principle of due process of law had its origin in England as a protection of individuals from arbitrary action on the part of the crown. It has been said that in this country the requirement is intended to have a similar effect against legislative power; that is, to secure the citizen against any arbitrary deprivation of his rights, whether relating to his life, his liberty, or *his property*. It is a limitation upon arbitrary power, and is a guaranty against arbitrary legislation. The primary purpose of this guaranty was the protection of the individual from the arbitrary exercise of the powers of government, unrestrained by the

established principles of private rights and distributive justice.

*Bank of Columbia* v. *Okely*, 4 Wheat 235.
*Hurtado* v. *California*, 110 U. S. 516, 28 L. Ed. 232.

**4. The power to amend cannot be extended so as to destroy a vested right.**

In the lower Court the case of *White* v. *U. S.*, 270 U. S. 175, was relied upon as a basis for the court's decision that Congress could nullify war risk insurance contracts under which rights had become vested.

All that *White* v. *U. S.* decided was that Congress had power to amend the war risk act to make the wish of the insured effective. The amendment in effect was a curative act, removing a technicality, so that the expressed will of the soldier in the written contract might be effective. This sort of act is legal and binding.

*Randall* v. *Kreiger*, 90 U. S. 137, 148-9.

But to hold as the lower Court did that by amendment, the Congress had the right to annul the contract or repudiate it or destroy all rights contracted to be given thereby, is altogether unsound, and without precedent.

In *Shields* v. *Ohio*, 95 U. S. 324, 24 L. Ed. 357-9, it was said:

> "'The power of alteration and amendment is not without limit. The alterations must be reasonable; they must be in good faith; and be consistent with the scope and object of the act of incorporation. Sheer oppression and wrong cannot be afflicted under the guise of amendment or alteration.''

In *The Commonwealth* v. *Essex Company*, 13 Gray 239, it was held that where the reserved right of amendment was unlimited and where, under power in a charter, rights

have been acquired and become vested, no amendment or alteration of the charter can take away the property or rights which have become vested under a legitimate exercise of the powers granted.

*Commonwealth* v. *Bridge Proprietors*, 2 Gray 339.
*Miller* v. *State*, 21 L. Ed. 104.
*Holyoke* v. *Lyman*, 21 L. Ed. 140.

In *Hyatt* v. *McMann*, 25 Barb. 467, it was said:

> "Power to legislate founded upon such a reservation in a charter to a private corporation is certainly not without limit, and it may well be admitted that it cannot be exercised to take away or destroy rights acquired by virtue of such a charter, which by legitimate use of the powers granted, have become vested in the corporation, but it may be safely affirmed that the reserved power may be exercised, and to almost any extent, to carry into effect the original purposes of the grant, or to secure the due administration of stockholders and creditors, and for the proper disposition of the assets."

In *Union Pacific* v. *United States*, 99 U. S. 720, 25 L. Ed. 501, it was held that the United States cannot, any more than a State, interfere with private rights except for legitimate governmental purposes. It was said that while the United States is not included within the constitutional prohibition which prevents states from passing laws impairing the obligation of contracts, yet equally with the states, they are prohibited from depriving persons or corporations of property without due process of law, and although Congress has reserved the right of amendment, it cannot undo what has already been done; and it cannot remake contracts that already have been made; but it may provide for what shall be done in the future and may direct what preparation shall be made for the due performance of contracts already entered into.

In *Holyoke Water Power Company* v. *Lyman*, 82 U. S. 507, 21 L. Ed. 104, a charter was subject to alteration, repeal or amendment. It was held:

> "Power to legislate founded upon such a reservation is certainly not without limit, but it may safely be affirmed that it reserves to the legislature the authority to make any alteration or amendment in the charter granted, subject to it, that will not defeat or substantially impair the object of the grant or any rights which have vested under it, which the legislature may deem necessary to secure either the object of the grant or any other public rights not expressly granted away by the charter."

No act of Congress or legislative fiat constitutes due process of law, whereby a vested right in or title to property may be either seriously impaired or destroyed.

*Chase* v. *U. S.*, 222 F. 593, 138 C. C. A. 117, C. C. A. 8 C.

From the foregoing, it clearly appears that although the right of amendment was reserved by Congress, such right of amendment cannot be exercised to deprive the party contracting with the Government of a vested right, nor can such right of amendment be exercised to defeat or substantially impair the object of the grant.

In the case at bar it appears that Congress has completely nullified the contract. The authority to do so is nowhere found in the law authorizing the contract. Power to amend clearly cannot mean power to destroy, and since Congress has seen fit to attempt to exercise a power not granted, and has likewise not only substantially impaired the object of the contract, but has completely defeated the right and the remedy by repealing the entire law under which the right and remedy were given, it must be held that such action is without any basis, either in the original

War Risk Insurance Act or in any other power given to Congress in connection with this class of legislation.

Section 17 of Public Act No. 2 of the 73rd Congress must therefore be held to be void, insofar as it repeals the original War Risk Insurance Act, as the power to amend does not include the power to repeal.

**5. The United States, in providing for war risk insurance and granting its consent to be sued, did not act in its sovereign capacity. It was a mere party to a contract. Hence it cannot withdraw rights vested under said contract.**

We agree that a sovereign cannot be sued in its own courts or in any other without its consent.

The fallacy of applying this doctrine to the case at bar is apparent, when it is seen that in the sale of yearly renewable war term insurance, the United States did not act in its sovereign capacity, but in effect established a relation of debtor and creditor. Furthermore, it gave its consent to be sued and provided for the payment of judgments rendered.

For a consideration, namely the monthly premium payments, the United States undertook to insure against death and total and permanent disability, such members of the military and naval forces who agreed to purchase and pay for insurance policies from $1000 to $10,000, in multiples of $500 each.

There were covenants in the policies, on the part of the Government, under which it undertook a liability, upon the happening of future events; and there was an undertaking or an agreement on the part of the soldier to pay the premiums provided for.

The Government and the soldier stood upon an equal footing as contractors, and upon the same footing, as debtor

and creditor, as if the contract or obligation existed between two natural persons. The relation of debtor and creditor arising under this contract is but a private relation. *It is not a sovereign or governmental relation.*

As was said in *Jensen* v. *United States,* 29 Fed. (2nd) 952,

> "It is suggested that since war risk insurance differs from commercial life insurance, in that it is an insurance against both death and total disability, and may be reinstated at a time when the insured is suffering from service connected temporary total disability, the rule applicable to commercial insurance is not controlling, in the constructions of section 307 of the World War Veterans' Act. But war risk insurance is not a gratuity but a contract between the insured and the government, and the rights of the parties are to be ascertained from the terms of their contract. *St. Bank & Trust Co.* v. *U. S.* (C. C. A.), 16 F. (2d) 439, The provisions of section 307, are, I take it, to be construed and determined by the applicable rules to similar provisions in any other contract of insurance."

In other words, the Government, in embarking in the insurance business, entered into a strictly contractual relationship, separate and apart from its sovereign character. And having done so, cannot claim the right to withdraw authority to sue on the contract entered into on the ground that it is a sovereign, any more than an individual would have such right.

The distinction between a sovereign's and a strictly contractual relationship, or the two-fold character in which the United States may act, is clearly pointed out in *In re Pacific Ry. Com'n,* 32 Fed. 260-1.

> "• • • The United States, in sections 5 and 6 of the act of 1862, and section 5 of the Act of 1864, tendered the railroad companies a contract, and, when

accepted, there was a contract between the parties upon the terms specified, obligatory upon both, and which could not be changed by either, without the consent of the other. Says the Supreme Court in *U. S.* v. *Railroad Co.*, 118 U. S. 238, 6 Sup. Ct. Rep. 1038, after quoting these provisions: 'These sections, taken together, constitute the contract between the United States and the appellee. *U. S.* v. *Railroad Co.*, 91 U. S. 72; *Sinking Fund Cases*, 99 U. S. 700-718; *Railroad Co.* v. *U. S.* 104 U. S. 662. This contract is binding on the United States, and they cannot, without the consent of the company, change its terms by any subsequent legislation. *Sinking Fund Cases, supra.*'

* * * * * * *

"The relation of the Central Pacific Railroad Company to the United States, therefore, under the contract, as a contract, is now, simply, that of debtor and creditor, with certain covenants for services on its completed road, still to be performed by the latter, with the debt, and performance of those covenants secured by certain specific liens upon portions of the property of the debtor. They stand upon an equal footing as contractors, and upon the same footing, as debtor and creditor, as if the indebtedness, obligations, and securities existed between two natural persons. This is, clearly, the result, as established by the Supreme Court in the Sinking Fund Cases, which has, by a divided court, extended the power of Congress further in that direction than any other case, and as it seems to us, to the utmost admissible limit. In those cases the chief justice, who announced the opinion of the majority of the court, in speaking of the Union Pacific Company, which is a corporation created by Congress itself, said:

'The United States occupy towards this corporation a twofold relation—that of sovereign, and that of creditor. *U. S.* v. *Railroad Co.*, 98 U. S. 569. Their rights as a sovereign are not crippled because they

are creditors, and their privileges as creditors are not enlarged by the charter because of their sovereignty. They cannot, as creditors, demand payment of what is due them before the time limited by the contract. Neither can they, as sovereign, or creditors, require the company to pay the other debts it owes, before they mature.' 99 U. S. 724.

* * * * * * *

"* * * *The relation of debtor and creditor arising under a contract is but a private relation. It is not a sovereign, or governmental, relation. And the power reserved in the acts of Congress to repeal, or amend the act as to the Central Pacific Railroad Company could, only, extend to amendment, so far as it operated as a law, and not as a contract, and, then, not to affect the terms of the contract after it had become executed, and rights had vested under it.*"

The same rule was announced by Mr. Justice Strong in *Central Pacific R. R. Co.* v. *Gallatin*, 99 U. S. 732, 25 L. Ed. 506:

"It is as much beyond the power of a legislature under any pretense, to alter a contract into which the government has entered, with a private individual, as it is for any other party to a contract to change its terms without the consent of the person contracting with him. *As to its contract the government in all its departments has laid aside its sovereignty, and it stands on the same footing with private contractors.*"

In Rose's Notes (Annotations 25 L. Ed. page 768) it is said:

"United States are as much bound by their contracts as are individuals."

While we do not challenge the rule that a state cannot be sued without its consent, we maintain,

(a) that if the State contracts in any other than its sovereign capacity and grants its consent to be sued, it cannot thereafter withdraw such consent, if rights have vested prior to the withdrawal.

(b) that if the withdrawal of the consent to be sued directly impairs the obligation of a contract, such withdrawal cannot be effected to divest vested rights.

In the case at bar, the plaintiff's son and defendant entered into a contract, wherein each contracted in an individual capacity. The United States agreed to insure plaintiff's son and plaintiff's son in consideration thereof agreed to pay monthly premiums for the protection. The writing of insurance was a non-governmental function. It was in no way incident to the exercise of sovereign powers. It was not compulsory; it was optional. And while it provided a cheap form of policy to the soldier, it was in no way different from a contract of insurance written by any life or accident insurance company. Under these conditions, the United States cannot claim immunity from suit by withdrawing behind the cloak of its sovereignty. Such a claim could be sanctioned only where it had contracted in its sovereign capacity.

To quote again from *In re Pacific Ry. Com'n.*, 32 Fed. 261:

> "* * * The relation of debtor and creditor arising under a contract is but a private relation. It is not a sovereign, or governmental relation. And the power reserved in the acts of Congress to repeal, or amend the act as to the Central Pacific Railroad Company could, only, extend to amendment, so far as it operated as a law, and not as a contract, and, then, not to affect the terms of the contract after it had become executed, and rights had vested under it."

**6. Congress has no right to impair the obligation of the contract of plaintiff's intestate.**

Article V of the United States Constitution prohibits the Federal Government from depriving any person of "*property without due process of law.*"

> "The principle that no person should be deprived of life, liberty or property exeept by due process of law did not originate in the American system of constitutional law, but was contained in Magna Charta as a part of ancient English liberties * * * It has even been said that the principle was known before Magna Charta (1215) and that it was originally designed to secure the subject against the arbitrary action of the crown, and to place him under the protection of the law."
>
> 6 R. C. L. 437:

In *Columbia Bank* v. *Okely*, 4 Wheat. 244, 4 L. Ed. 559, the Court said:

> "As to the words from Magna Charta, (due process of law) incorporated into the constitution of Maryland, after volumes spoken and written with a view to their exposition, the good sense of mankind has at length settled down to this; that arbitrary exercise of the powers of government, unrestrained by the established principles of private rights and distributive justice."

Mr. Webster, in his argument in *Dartmouth College* v. *Woodward*, 4 Wheat. 518, 4 L. Ed. 629, said:

> "By the law of the land, is most clearly intended the general law; a law which hears before it condemns; which proceeds upon inquiry, and enters judgment only after a trial. The meaning is, that every citizen shall hold his life, liberty and property and immunities under the protection of the general rules which govern

society. Everything which may pass under the form of an enactment is not, therefore, to be considered the law of the land. If this were so, the acts of attainder, Bills of pains and penalties, Acts of confiscation, Acts reversing judgments, and acts directly transferring one man's estate to another, legislative judgments, decrees and forfeitures of all possible forms, would be the law of the land. Such a strange construction would render constitutional provisions of the highest importance inoperative and void. It would tend directly to establish the Union of all powers in the legislature. There would be no general, permanent law for courts to administer or men to live under."

Where rights are acquired by a citizen under the existing law, there is no power in any branch of the Government to take them away except by due process of law.

6 R. C. L. 444

*Rowan* v. *State*, 30 Wis. 129, 11 Am. Rep. 559.

The purpose of this clause is to exclude arbitrary power from every branch of the Government. Hence it is a restraint on the legislative, the executive and judicial departments.

6 R. C. L. 445.

The limitations inherent in the requirements as to due process of law are binding equally on the United States.

*Union Pac. R. Co.* v. *United States*, 90 U. S. 700, 25 L. Ed. 496.

And it is recognized that the United States cannot interfere with private rights, except for legitimate governmental purposes, nor can the Federal Government deprive any person of property without due process of law.

*Sinking Fund Cases*, 99 U. S. 700, 25 L. Ed. 496.

In *Sturgis* v. *Crowninshield,* 4 Wheat. 206, Chief Justice Marshall, in discussing the purpose of the Convention which framed the Federal Constitution in regard to the protection of private contracts, said:

> "To restore public confidence completely, it was necessary not only to prohibit the use of particular means by which it might be affected, but to prohibit the use of any means by which the same mischief might be produced. The Convention appears to have intended to establish a great principle, that *contracts should be inviolable.*"

In *Loan Ass'n.* v. *Topeka,* 20 Wall. 655, 22 L. Ed. 455, it was held that property vested in contracts is, like all other property, protected against invasion by the legislature, whether state or national.

In *Marbury* v. *Madison,* 1 Cranch 163, Chief Justice Marshall said:

> "The government of the United States has been emphatically termed a government of laws and not of men. It will certainly cease to deserve this high appelation if the laws furnish no remedy for the violation of vested rights."

In *Gunn* v. *Barry,* 82 U. S. 622, 21 L. Ed. 212, 15 Wall. 610, it was said:

> "To take away, therefore, the legal remedy of contracts thus entered into, is to destroy a material portion of the consideration which induced their execution.
>
> "The right to enforce the contract by legal process enters into the contract itself, and when that right is taken away, its obligation is impaired."

Daniel Webster in a speech in the Senate of the United States on July 11, 1832, on the President's veto of the United States Bank Bill, said:

"Any Congress may repeal the act or law of its predecessor, if in its nature it be repealable, just as it may repeal its own act, and if a law or an act is unrepealable in its nature, it can no more be repealed by a subsequent Congress than by that which passed it. All this is familiar to everybody. And Congress, like every other legislature, often passes acts which, being in the nature of grants or contracts, are irrepealable ever afterwards * * *. Every legislature binds itself, whenever it makes a grant, enters into a contract, bestows an office, or does any other act or thing which is in its nature irrepealable * * *."

Congress is, as such, prohibited from passing laws impairing the obligation of contracts, as are the legislatures of the states.

*Union P. R. Co.* v. *U. S.*, 99 U. S. 718, 25 L. Ed. 501.
*Calder* v. *Bull*, 3 Dall. 388, 1 L. Ed. 649.
*U. S.* v. *Lee*, 106 U. S. 196, 27 L. Ed. 171.
*Dartmouth College* v. *Woodward*, 4 Wheat. 518, 4 L. Ed. 629.

In the case at bar, section 17 of Public Act No. 2 directly voids plaintiff's contract. Consequently, if Public Act No. 2 is held to be constitutional, plaintiff's contract is directly, not indirectly, affected. He is being deprived of property without due process of law, contrary to the Fifth Amendment. As stated by Mr. Justice Strong, in the Legal Tender Cases, the Fifth Amendment "has always been understood as referring to a direct appropriation and not to consequential injuries resulting from the exercise of lawful power. It has never been supposed to have any bearing upon or inhibit laws which indirectly work harm and loss to individuals."

That is the reason why the Supreme Court upheld the Legal Tender Act, namely, because the act did not make a

direct appropriation of anyone's property, and any injuries that resulted from its operation were consequential. In the case at bar, Public Act No. 2 operates directly to destroy plaintiff's contract by express words, and takes plaintiff's property without due process of law.

An analogous situation is found in *Union Pacific R. R. Company* v. *United States,* 99 U. S. 720, 25 L. Ed. 501. In that case, the question was whether the Union Pacific Railroad Company was deprived of its property without due process of law by reason of Congress passing an Act in 1878 requiring the Union Pacific Railroad Company to establish a sinking fund, for the repayment of a loan to the United States which had been granted under a previous act of Congress.

Mr. Chief Justice Waite, who delivered the opinion of the Court, while upholding the validity of the legislation on the theory that no property was being taken from the railroad company by requiring it to create the sinking fund, said:

> "The United States cannot, any more than a State, interfere with private rights, except for legitimate governmental purposes. They are not included within the constitutional prohibition which prevents States from passing laws impairing the obligation of contracts, but, equally with States, they are prohibited from depriving persons or corporations of property without due process of law. They cannot legislate back to themselves, without making compensation, the lands they have given this Corporation to aid in the construction of its railroad. Neither can they by legislation compel the Corporation to discharge its obligations in respect to the subsidy bonds otherwise than according to the terms of the contract already made in that connection. The United States are as much bound by their contracts as are individuals. If they repudiate their obligations, it is as much repudiation, with all the wrong

and reproach that term implies, as it would be if the repudiator had been a State or a municipality or a citizen. No change can be made in the title created by the grant of the lands, or in the contract for the subsidy bonds, without the consent of the corporation. All this is indisputable."

And, even though the original Act of Congress under which the contract with the Union Pacific Railroad Company was made, provided that Congress might at any time alter, amend, or repeal the Act, Chief Justice Waite makes it very clear that such a power has its limits and cannot be used to take away property already acquired under the operation of the charter, or to deprive the corporation of the fruits actually reduced to possession. He stated the limits of the power of Congress in this respect, as follows:

"'It may safely be affirmed that the reserve power may be exercised, and to almost any extent, to carry into effect the original purposes of the grant, or to secure the due administration of its affairs, so as to protect the rights of stockholders and of creditors, and for the proper disposition of its assets;' and again; in *Holyoke Company* v. *Lyman*, 15 Wall., 519, 21 L. Ed. 139. 'To protect the rights of the public and of the corporators, or to promote the due administration of the affairs of the corporation.'"

He further said:

"* * * In so doing it cannot undo what has already been done, and it cannot unmake contracts that have already been made, but it may provide for what shall be done in the future, and may direct what preparation shall be made for the due performance of contracts already entered into."

Thus it appears from the prevailing opinion that Congress, once having entered into a contract with a corpora-

tion or individual for a valid consideration, cannot unmake that contract.

A further discussion of principles underlying this limitation upon the power of Congress, is found in the dissenting opinion of Mr. Justice Strong in the same case, in which he says:

> "'When a government enters into a contract with an individual, it deposes, as to the matter of the contract, its constitutional authority, and exchanges the character of legislator for that of a moral agent, with the same rights and obligations as an individual. Its promises may be justly considered as excepted out of its power to legislate, unless in aid of them. It is in theory impossible to reconcile the idea of a promise which obliges, with a power to make a law which can vary the effect of it.' 3 Hamilton's Works 518. Opinions similar to this have often found expression in judicial decisions, even in those of this Court. If this be sound doctrine, it is as much beyond the power of a Legislature, under any pretense, to alter a contract into which the government has entered with a private individual, as it is for any other party to a contract to change its terms without the consent of the person contracting with him. As to its contract the government in all its departments has laid aside its sovereignty, and it stands on the same footing with private contractors."

The Court further observed that Congress being a body having limited powers, is nowhere vested with the right to impair the obligation of contracts. The Court said:

> "Now, where is the power of Congress to add new terms to any contract made with the United States, or made between any two private individuals? It is certainly not to be found in the Constitution. True, the provision that no State shall pass any law impairing the obligation of contracts applies only to State legislation. For such legislation the prohibition was

necessary; for State Legislatures have all legislative power which is not expressly denied to them. But no necessity existed for imposing such a limitation on the power of Congress. As Mr. Hamilton said in the 84th number of the Federalist, 'Why declare that things shall not be done which there is no power to do?' Congress has no power except such as has been expressly granted to it, or such as is necessary or proper for carrying into execution the powers specified, and those vested by the Constitution in the government, or some department or officer thereof. I search in vain for any express or implied grant of power to add new terms to any existing contracts made by or with the government, or any grant of power to destroy vested rights. No power has been given to Congress to lessen the obligations of a contract between private parties by direct legislation, except by the enactment of uniform laws on the subject of bankruptcy. Even a bankrupt law cannot be enacted applicable only to single corporations or single debtors. To be constitutional, it must be uniform throughout the United States. I admit that in the exercise of some of the powers granted, Congress may enact laws that indirectly affect existing contracts and lessen their obligation, but I deny that it can by any direct action, otherwise than by a bankrupt law even relieve a debtor to a private party from any duty he has assumed by his contract. Much less can it change the stipulations of the contract and impose additional liabilities upon a contractor with the government. Such an exercise of power would be making a contract for parties to which they never assented. In all the history of congressional legislation before the Act of 1878, such a power was never attempted to be exercised.

"And not only is such legislative authority not conferred upon Congress by the Constitution, but it is, in effect, expressly denied. The Fifth Amendment contains restrictions taken, in substance, from Magna Charta. Among them are the provisions that no person shall be deprived of life, liberty or property with-

out due process of law, nor shall private property be taken for public use without just compensation. These are restrictions upon legislative as well as executive power. What is due process of law is well understood. It is law in regular course of administration through courts of justice. Coke, 2 Inst. 272; *Murray* v. *Hoboken L. and Imp. Co.*, 18 How., 272, 15 L. Ed. 372. 'The terms "the law of the land," said Chief Justice Ruffin, *Hoke* v. *Henderson*, 4 Dev. (N. C.) 15, do not mean merely an Act of the General Assembly. If they did, every restriction upon legislative authority would be at once abrogated, and private property would be at the mercy of the Legislature.' Yet the Act of 1878 does attempt by its own force, and without any judicial action, not only to change a contract and increase its obligations, but also to deprive the Railroad Companies of their property. * * *"

Mr. Justice Field, in the same case, likewise concurred in this view in making the following observations:

"In the Federalist, Mr. Madison declared that laws impairing the obligation of contracts were contrary to the first principles of the social compact and to every principle of sound legislation; and in the Dartmouth Coll. Case Mr. Webster contended that Acts, which were there held to impair the obligation of contracts, were not the exercise of a power properly legislative, as their object and effect was to take away vested rights. 'To justify the taking away of vested rights,' he said, 'there must be a forefeiture, to adjudge upon and declare which is the proper province of the judiciary.' Surely, the Constitution would have failed to establish justice had it allowed the exercise of such a dangerous power to the Congress of the United States.

"In the second place, legislation impairing the obligation of contracts impinges upon the provision of the Constitution which declares that no one shall be deprived of his property without due process of law;

and that means by law in its regular course of administration through the courts of justice. Contracts are property, and a large portion of the wealth of the country exists in that form. Whatever impairs their value diminishes, therefore, the property of the owner; and if that be effected by direct legislative action operating upon the contract, forbidding its enforcement or transfer, or otherwise restricting its use, the owner is as much deprived of his property without due process of law as if the contract were impounded, or the value it represents were in terms wholly or partially confiscated."

From the foregoing, it appears that Congress has no implied or express power to impair the obligations arising under a vested contract entered into by and between the Government and an individual, any more than a State has that right. Congress is restricted, as a matter of fact, from impairing the obligations of contracts by the Fifth Amendment to the Constitution where such legislation affects vested property rights.

**7. Congress may not impair the obligation of contracts under the specious claim that it is acting to maintain the credit of the United States Government.**

Probably the weakest reason of all urging the validity of Public Act No. 2, is that Congress may, in order to preserve the stability of the Government, directly cancel valid outstanding contracts to thereby maintain the credit of the United States Government. The fallacy of this reasoning is apparent when it is considered that the surest way, either for an individual or the Government, to destroy its credit is by repudiating its outstanding obligations; for, by cancelling and voiding its contracts and failing to meet its obligations, the Government, as well as an individual, destroys confidence in the integrity of its under-

takings. It is by carrying out its outstanding obligations that the Government or an individual maintains credit, not by the repudiation of such obligations. Furthermore, it is conclusively shown that there was no pressing necessity to void outstanding contracts in order to maintain the credit of the United States Government, because hardly had the Congress enacted the Economy Bill, which slashed four hundred million dollars from veterans' allowances, including the few million still due on war risk insurance policies, when Congress, within a fortnight, enacted the Reforestration Bill, appropriating five hundred million dollars for the establishment of a civilian conservation corps and the planting of saplings.

If there had been any emergency existing, requiring Congress to take drastic steps for the curtailment of its expenditures, including the repudiation of its obligations, as was done in the Economy Bill, its action in appropriating a greater amount of money immediately thereafter than was saved by the reductions proposed in the Economy Act is definite evidence of the fact that Public Act No. 2, being an act to maintain the credit of the United States Government, was a misnomer; was unnecessary and unjustified in view of the financial condition of the United States Government at the time it was enacted.

While this is not determinative of the question involved in the case, we are simply calling the Court's attention to the fact that the Government should not be permitted to hide behind the false cloak of economy in asserting that public necessity required the enactment of Public Act No. 2, including the abrogation of its war risk insurance contracts, when, as a matter of fact, there was no such emergency.

This Court has already held that "The war, or the conditions which followed it, did not suspend or affect the pro-

vision of the Federal Constitution that just compensation must be made for property taken for public use."

*U. S.* v. *Cohen Grocery Company*, 255 U. S. 81, 88, 65 L. Ed. 516, 14 A. L. R. 1045.

*U. S.* v. *New River Collieries Company*, 262 U. S. 340, 67 L. Ed. 1014.

**8. The Fifth Amendment is self-executing, and needs neither the War Risk Insurance Act nor the Tucker Act to aid the carrying out of its provisions.**

"The rule is thus stated by Judge Cooley in his work upon Constitutional Limitations (p. 99): 'A constitutional provision may be said to be self-executing if it supplies a sufficient rule by means of which the right given may be enjoyed and protected, or the duty imposed may be enforced; and it is not self-executing when it merely indicates principles, without laying down rules by means of which those principles may be given the force of law. Thus, a constitution may very clearly require county and town government; but if it fails to indicate its range, and to provide proper machinery, it is not in this particular self-executing, and legislation is essential.'

"Where a constitutional provision is complete in itself it needs no further legislation to put it in force. When it lays down certain general principles, as to enact laws upon a certain subject, or for the incorporation of cities of certain population, or for uniform laws upon the subject of taxation, it may need more specific legislation to make it operative. In other words, it is self-executing only so far as it is susceptible of execution. But where a constitution asserts a certain right, or lays down a certain principle of law or procedure, it speaks for the entire people as their supreme law, and is full authority for all that is done in pursuance of its provisions. In short, if complete in itself, it executes itself."

*Davis* v. *Burke*, 179 U. S. 399, 403, 21 S. Ct. 210, 45 L. Ed. 249.

See, also, as to the presumption that it is self-executing:

6 R. C. L. 58, Sec. 53.

*Winchester* v. *Howard*, 136 Calif. 432, 64 P. 692.

*State* v. *Kyle* (Missouri) 166 Mo. 287, 56 L. R. A. 115.

*State* v. *Ross*, 114 La. 898, 81 So. 386.

*State* v. *Hall*, 44 N. D. 459, 171 N. W. 213.

*Brice* v. *McDow*, 116 S. C. 324, 108 S. E. 84.

*Thorne* v. *Clarksburg*, 88 W. Va. 251, 106 S. E. 644.

*Stevens* v. *Benson*, 50 Or. 269, 91 Pac. 577.

*Bareham* v. *Rochester*, 128 Misc. 642, 220 N. Y. Sup. 566 (3).

*Detroit* v. *Oakland Circuit Judge*, 237 Mich. 446, 212 N. W. 207 (3).

*Chick Spr. Water Co.* v. *State Highway Dept.*, 159 S. C. 481, 157 S. E. 842 (3-9).

*Johnson* v. *Parkersburg*, 16 W. Va. 402, 37 Am. Rep. 779.

*Householder* v. *Kansas City*, 83 Mo. 488.

*McElroy* v. *Kansas City*, 21 Fed. 257.

*Willis* v. *St. Paul Sanitation Co.* (Minn.) 48 Minn. 140, 16 L. R. A. 281, and annotations following.

*Chambers* v. *Cincinnati & Ga. R. Co.*, 69 Ga. 320.

## Conclusion.

(a) We submit that Public Act No. 2, inspfar as it voided the war risk insurance contracts upon which claims had been filed in the Veterans Administration, but which were undetermined at the time of the enactment of Public Act No. 2, is null and void and unconstitutional, because it deprives the holder of the policy; deprives plaintiff's intestate in the case at bar, of a vested right.

(b) We further contend that in providing for war risk insurance and granting its consent to be sued, the United

States did not act in its sovereign capacity and hence it cannot withdraw any rights which became vested under said contract.

(c) We submit that Congress has no right to impair the obligation of plaintiff's intestate's contract, under Article V of the United States Constitution, which prohibits the Federal Government from depriving any person of property without due process of law.

(d) We submit that there is no provision in the United States Constitution directly or indirectly authorizing the United States to impair the obligations of a contract into which it has entered with an individual or corporation, except in pursuance of a direct grant, such as is provided for under the provision of the Constitution authorizing Congress to provide uniform bankruptcy laws, or under such circumstances as in the execution of express powers, an outstanding contract may be indirectly affected.

(e) We submit that the Fifth Amendment to the Constitution, which provides that no person shall be * * * deprived of * * * property without due process of law, nor shall private property be taken for public use without just compensation, deprives Congress of the right to legislate back to itself, without making compensation, a contract previously made.

(f) We submit that the Fifth Amendment is self-executing, and needs neither the War Risk Insurance Act nor the Tucker Act to aid the carrying out of its provisions.

For the foregoing reasons, we respectfully submit that the motion of the defendant to dismiss the declaration filed in this case should have been denied.

Respectfully submitted.

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